Supreme Court of the United States

No. 1813

OCTOBER TERM 1970

JOSEPH F. SCHIPANI,

Petitioner.

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

This reply is needed because the Brief in Opposition proposes a drastic re-framing of the certiorari issue here involved, disregarding what the parties litigated and what both of the Courts below explicitly decided in this case. The Government is now asking the Court to deny certiorari on a supposed issue structure which neither the parties nor the Courts below ever waged at all.

The only issue litigated and decided in the Courts below was whether petitioner Schipani was unconstitutionally sentenced in this income tax case because in imposing sentence the District Judge considered facts and inferences drawn from illegally obtained electronic-eavesdrop evidence which had been suppressed at trial. The sentencing Judge expressly stated that, in imposing the exceptionally severe sentence in this case, he had considered the suppressed electronic materials. The Court of Appeals, in affirming and approving the sentencing Judge's use of this suppressed illegal evidence, stated the issue as follows (App. Pet. Cert. 2A):

> "The appeal raises a single issue: is it proper for a judge in deciding upon a sentence to use evidence which has been excluded from trial because it was obtained in violation of the Fourth Amendment."

And the concluding words in the opinion of the Court of Appeals were (id. 8A):

> "Where illegally seized evidence is reliable and it is clear, as here, that it was not gathered for the express purpose of improperly influencing the sentencing judge, there is no error in using it in connection with fixing sentence."

In arriving at their aforesaid respective conclusions that it was constitutionally permissible in this case to consider the illegally seized evidence in imposing sentence, both of the Courts below made a detailed analysis of the constitutional merits of using such evidence for such purpose. Likewise, the parties briefed and argued in detail the merits of this constitutional issue in both Courts below.

Thus, the entire and the sole litigational framework, the entire and the sole decisional framework and decisional result, in both of the Courts below, were in terms of (1) the judicially-declaredly operative "*constitutional fact*" that the illegal electronic evidence was the conscious and express judicial basis for imposing the exceptionally heavy sentence in this case and, (2) the dispositive decisional fact that both Courts below were being called upon to decide as to the constitutional permissibility of using such illegal evidence for such sentencing purpose. Both of these Courts decided such was constitutionally permissible; and both of these Courts rendered decision in favor of such constitutional permissibility on the basis of their examination of the problems of constitutional doctrine involved. Nothing else was litigated or decided in the proceedings below.

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Now, however, in the Brief in Opposition, it is being suggested, for the first time in this case, that the judgment here sought to be reviewed is sustainable, and needs no certiorari review, for the sole reason that:

> "• • • [I]nformation derived from an illegal electronic surveillance device *tend[ed]* to *confirm prior information* that petitioner was 'a criminal figure' whose unreported income 'was the proceeds of organized crime'" (Br. Opp., p. 2) (Emphasis supplied).
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> "The validity of petitioner's sentence is not impaired by the fact that the district court considered information acquired in 1961 by illegal means, which *corroborated earlier F.B.I. reports* attributing to petitioner various sources of legal and illegal income and identifying him as an influential and powerful underworld figure • • •" (Br. Opp. p. 6) (Emphasis supplied).
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> "*Before the surveillance began the government already possessed substantial* background reports of petitioner's status as an important professional criminal, • • •" (Br. Opp. p. 7) (Emphasis supplied).

The Government thus is now suggesting, for the first time, that, even though the sentencing Judge expressly used the illegal electronic evidence and expressly justified doing so only after extensive examination as to the constitutional-doctrinal merits of doing so—in all of which the Court of Appeals expressly approved the sentencing Judge's decisional procedures and expressly ratified his conclusions in this matter—nevertheless now, the Government urges, this Court ought to reject our certiorari prayer on the sole ground that *the F.B.I.* assertedly had substantial unfavorable information about petitioner before the illegal electronic surveillance was started.

The Brief in Opposition is noteworthy for its total silence as to the important issues of constitutional analysis explicitly considered and decided by both of the Courts below. Instead, the Brief in Opposition urges, in effect, that it was alright for petitioner Schipani to be sentenced on the basis of the illegal evidence simply because the *F.B.I.* anteriorly knew or believed—or says it knew or believed—that petitioner was a bad man.

The Brief in Opposition does not even venture to suggest that the *sentencing Judge himself relied* on this anteriorly anterior knowledge or opinion of the *F.B.I.* True, the Brief in Opposition does point out that the sentencing Judge knew about the F.B.I.'s anterior (pre-electronic) information (Br. Opp. pp. 3-6). But, we repeat, the Brief in Opposition does not contend (and could not) that the sentencing Judge *judicially noted* any such anterir F.B.I. information in sentencing petitioner Schipani.

The necessary argumentative thrust of the Brief in Opposition is that, in view of the mere existence of the anterior (pre-electronic) F.B.I. information, it does not matter that the sentencing Judge *expressly noted* the subsequently obtained illegal electronic evidence.

In other words, the Brief in Opposition asks this Court now merely to infer or guess (now for the first time in the within proceedings on petition for certiorari) that despite the expressly-judicially-declared "constitutional fact" of record in both of the Courts below that the sentencing Judge used the suppressed illegal evidence, there is now needed a judicial emendation of the record by this Court to make it appear that both of the Courts below did not really mean what they said when they judicially treated and decided this case as being structured on the "constitutional fact" that the sentencing Judge did what he did here (in imposing an exceptionally heavy sentence) because of what he had learned from the suppressed illegal electronic evidence.

The Government is now asking this Court to re-write the certified record below, and to do so on the basis of sheer judicial guesswork supported by nothing more than the ipse dixit of the authors of the Brief in Opposition as spokesmen for the ever-hopeful keepers of the files of the F.B.I.

In the District Court proceedings in 1968-1969 on petitioner Schipani's motion to suppress electronic evidence—i.e. when the Government brought this case on for retrial after this Court had vacated Schipani's first conviction for electronic taint, 395 U.S. 372—the Government introduced in evidence several exhibits consisting of the pre-electronic F.B.I. reports. Since it is these pre-electronic reports to which the Government is referring in its within Brief in Opposition (pp. 5-6), it is necessary to note just what those pre-electronic F.B.I. items were.

In Schipani's petition for certiorari, no. 1492 Misc., October Term 1969, cert. denied, 397 U.S. 922, the record materials comprising these pre-electronic F.B.I. items were before this Court (the latter No. 1492 Misc. of October Term 1969 was Schipani's petition for certiorari seeking review of his second conviction and of the lower Courts' determination that said second conviction was not electronically tainted). In the 1968-1969 suppression proceedings which eventuated in the latter no. 1492 Misc. (October Term 1969), the pre-electronic F.B.I. reports in the record consisted of (1) Government's Exhibit 9, being the F.B.I. report of October 10, 1968, mentioned on p. 5 of the Brief in Opposition herein—see the record in no. 1492 Misc. October Term 1969, transcript of May 8, 1969 (before Judge Weinstein), testimony of F.B.I. agent McShane, pp. 406-409, also testimony of Department of Justice attorney Philip Wilens, id, pp. 476-479; and (2) Government Exhibits 10A to 10G inclusive, consisting of F.B.I. reports preceding the latter F.B.I. report of October 10, 1968 (Exhibit 9 supra), received in evidence in the 1968-1969 suppression proceedings before Judge Weinstein during the testimony of F.B.I. agent McShane, Transcript of May 8, 1969, pp. 411-412.

The foregoing 1968-1969 Exhibits 9 and 10A-10G are the entirety, apparently, of the pre-electronic F.B.I. reports containing information about Schipani, i.e., the pre-electronic F.B.I. reports which the Government is now asking this Court to treat as in effect wiping out the decisional impact of the judgment here sought to be reviewed. (It is interesting to note that in its Brief in Opposition herein the Government does not bother to cite to this Court the Exhibit numbers or other record-identifying citations of these now-being-touted pre-electronic F.B.I. reports (Br. Opp. 5-6 and passim). It appears that all of those pre-electronic F.B.I. reports, which were received in evidence at the 1968-1969 suppression proceedings before Judge Weinstein were sealed by Judge Weinstein at the Government's request. Our own files at present contain, out of all of those F.B.I. exhibit items (Exhibits 9 and 10A-10G), only an item dated June 5, 1969 bearing Clerk's exhibit no. 10B plus an unmarked item dated February 4, 1969. We do not have in our possession, and have not had, since the time of the aforesaid 1968-1969 suppression proceedings before Judge Weinstein, any copy of either the primary Exhibit 9 (F.B.I. report of October 10, 1969), or of the earlier-dated F.B.I. reports received in evidence as Exhibits 10A and 10C to 10G.

It is these last cited pre-electronic F.B.I. reports on which the Government is pitching its entire presentation in the present Brief In Opposition. These F.B.I. reports consist of the typical medley of raw, undigested, unattributed F.B.I. investigative "information". These pre-electronic F.B.I. reports are a far cry from the suppressed, illegal electronic logs whose sentencing significance the Government is now trying to downgrade.

Before this Court should decide to deny certiorari in this case—if such denial is going to turn on the Government's latest contention that the illegal electronic logs do

not matter in view of the pre-electronic F.B.I. reports—the Court ought, we submit, to request the Government to make available to the Court copies of the aforesaid sealed Exhibits 9 and 10A-10G, and of the sealed electronic logs, from the 1968-1969 record in No. 1492 Misc. Oct. Term 1969.

CONCLUSION

It is respectfully submitted that the petition for certiorari herein should be granted; and that before denying the petition the Court should request the Government to make available the sealed papers mentioned in our last preceding paragraph, *supra*, if such possibly forthcoming denial of certiorari may turn on the Government's contention in the Brief in Opposition that the use of the suppressed illegal electronic evidence for purposes of sentencing was not constitutionally aggrieving in the light of the existence of the pre-electronic F.B.I. reports.

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Dated: March 12, 1971